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**Before the
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Washington, D.C. 20554**

In the Matter of)

Review of the Commission's)

Broadcast and Cable)

Equal Employment Opportunity)

Rules and Policies)

MM Docket No. 98-204

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Reply Comments of the National Association of Broadcasters

**NATIONAL ASSOCIATION
OF BROADCASTERS**

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April 15, 1999

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Executive Summary

NAB believes our proposal for an EEO Outreach rule is the best way for the Commission to meet its goals and result in efficient, effective and meaningful outreach. Many commenters provided support for allowing “alternative” ways to recruit – such as Internet postings, job fairs, job banks, etc. – but those same commenters believe these efforts are merely supplemental to the recruitment that is proposed by the Commission. NAB believes that these types of efforts are exactly the kind that the Commission should recognize as being the most effective and give credit to those broadcasters who choose to utilize them.

The Commission specifically requested evidence of a nexus between employment that would lead to an increase in minority and female ownership and diversity of programming. No commenter provided definitive evidence on this issue. Many supplied anecdotal evidence and informal surveys. Without this evidence, the FCC risks running down the same path it followed with the *Lutheran Church* case. Other studies submitted to support strict enforcement of EEO rules should be disregarded as their conclusions have been questioned – in one case, repeatedly.

The Commission should not reinstate the collection of the Annual Employment Report because it imposes an improper incentive for broadcasters to hire minorities and females and there is no guarantee the information will not be used in an improper way by the Commission and others. Random sampling is an option that could achieve the Commission’s statistical purpose, and would be less burdensome.

The proposed recordkeeping still is burdensome, despite the contentions of some commenters, who failed to recognize the burdens of procuring and maintaining the race and gender information for every applicant for every position and the burden of comparing that information to the labor workforce during self-assessment. Under NAB’s proposal, the biennial

certifications will show compliance with the EEO rules and compliance with the rule ensures that the goal of outreach has been met without additional self-assessment.

The Commission should leave the job of investigating, holding hearings and issuing final judgments on allegations of discrimination to the agency designed to deal with those issues – the EEOC. The FCC’s EEO rules can be properly enforced through random audits.

Finally, any FCC EEO rule must sunset as even advocates of the FCC’s proposal agree. However, the Commission cannot set “parity” as a goal in order to sunset the rules. This would be a quota placed on the industry, with the prize being complete retirement of EEO regulations.

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I. INTRODUCTION

The National Association of Broadcasters ("NAB")¹ submits its reply comments on the above-captioned *Notice of Proposed Rule Making* ("Notice").² NAB submitted an EEO Outreach Rule in our comments in this proceeding,³ and upon review of other's comments, we believe our proposal is the most effective way to meet the goals of the Commission.

The Commission must take this opportunity to establish efficient and effective EEO Outreach, and should do so without imposing questionable and burdensome requirements that could ultimately impede the stated Commission goal. Commenters were not able to fill in key

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

² *Notice of Proposed Rule Making* in MM Docket No. 98-204, ___ FCC Rcd ___ (1998).

³ Comments of the National Association of Broadcasters in MM Docket No. 98-204, filed March 1, 1999 [hereinafter "NAB Comments"].

legal holes left open by the Commission's *Notice*. The FCC must not repeat the same procedures that led the *Lutheran Church* court to conclude that the FCC's EEO rules were unconstitutional.

The NAB's proposal provides many different ways for stations to conduct meaningful outreach, as their resources allow. In many instances, commenters supporting the FCC's proposal, as presented, are in the odd position of supporting a set of proposed rules that, as they have admitted, were not as effective as they would have liked them to be. The issue should center on establishing a set of EEO Outreach rules that will get job vacancy information out to a wide variety of applicants – not trying to minimize the impact of *Lutheran Church*, and thus dooming new rules from the start.

Commenters agree that “alternative” means of recruitment such as job fairs and the Internet can be effective and useful, but believe they are merely supplemental. NAB believes it is these alternative ways that will make EEO outreach more effective, and broadcasters should be given the choice – and the credit – for making those efforts. We have included many of these types of recruitment in our proposal and believe they will provide more people with job information.

II. COMMENTS FAILED TO SHOW EVIDENCE OF A NEXUS

The Commission specifically asked for evidence of a nexus between employment of minorities and women and minority and female ownership of broadcast stations and programming diversity. This link is necessary because the Commission must prove that it has the authority to promulgate EEO rules. Any evidence provided by commenters is irrelevant or anecdotal at best. American Women in Radio and Television (“AWRT”), Minority Media and Telecommunication Council *et al.* (“MMTC”), United Church of Christ *et al.* and National Organization of Women *et al.* all submitted “evidence” of a nexus through witness statements

and informal surveys.⁴ Clearly this does not definitely establish a link that would withstand judicial scrutiny. AWRT submitted a 1998 study that looked at women and the creation of programming, but admitted that the study did not address specifically decisions by stations and operators with respect to choosing programming.⁵ The National Hispanic Foundation for the Arts submitted a 1988 Congressional Research Survey Report on minority ownership and minority broadcasting that interpreted FCC data. The Report stated that minority owners tended to program a greater proportion of their stations for their own minority audience.⁶ The Report found that women owners did not program for women as much as minority owners.⁷ It is important to note that the Report did not – and could not – determine to what degree station programming strategies are market driven rather than the results of minority ownership interests.⁸ Further, the Report does not show that the *employment* of minorities and women would ultimately lead to either increased minority ownership or increased programming

⁴ Comments of AWRT in MM Docket No. 98-208, filed March 1, 1999, at 6 – 7 [*hereinafter* “AWRT”] (“There has yet to be a study published that concludes that the presence of women in a workplace has no impact on the way that business is conducted, and disagrees with the *Lutheran Church* conclusion that lower-level positions do not influence programming. *Id.* However, AWRT does not provide any substantive evidence.”); Comments of Minority Media and Telecommunications Council *et al.* in MM Docket No. 98-204, filed March 19, 1999, at Volume III [*hereinafter* “MMTC”]; Comments of UCC *et al.* in MM Docket No. 98-204, filed March 1, 1999, at Supporting Statements to Comments [*hereinafter* “UCC”]; Comments of NOW Foundation *et al.* in MM Docket No. 98-204, filed March 1, 1999, at 18 [*hereinafter* “NOW”].

⁵ AWRT at 8.

⁶ Congressional Research Service, “Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?” (1988), at 42.

⁷ *Id.* at 44.

⁸ *Id.* at 3.

diversity, the two assumptions that the Commission itself acknowledged must be supported in order for it to adopt detailed EEO rules.

III. RECRUITMENT

A. MMTC's Conclusions based on the Submitted Tennessee and Murrell Studies should be disregarded.

As stated in our comments, the FCC proposed virtually the same EEO rules as before, minus processing guidelines.⁹ The Minority Media and Telecommunications Council *et al.* (“MMTC”) submitted voluminous (literally and figuratively) comments that discussed the need for strict enforcement of EEO rules to ensure the elimination of “word of mouth” recruitment.¹⁰ MMTC again submitted, as support for its contention that the FCC’s rules should be retained and strengthened, its 1996 “Tennessee Study.”¹¹ NAB attaches as an appendix to these reply comments, our 1996 Reply Comments in the “EEO Streamlining” proceeding.¹² Within those comments, we described why the Commission should disregard this study because it is incomplete and the results were misinterpreted. Clearly this study is not now – nor then – a reliable source for conclusions regarding EEO practices. Indeed, MMTC’s failure to even

⁹ NAB Comments at 16-17.

¹⁰ MMTC at 18 –23, 65.

¹¹ MMTC’s study, “EEO Programs and EEO Performance at Tennessee Radio Stations” (1996). MMTC at 193-201. *See also* MMTC’s Streamlining Comments, MM Docket No. 96-16, filed Sept. 17, 1996.

¹² *See Appendix A.* (Reply Comments of the National Association of Broadcasters in MM Docket No. 96-16, filed October 25, 1996).

discuss critiques of its study, much less correct its inadequacies, demonstrates MMTC's lack of concern about helping the Commission develop a legally sustainable EEO program.¹³

MMTC now submits a 1999 study on compliance with EEO rules that attempts to verify recruitment sources that are cited by stations on renewal applications. As with the Tennessee Study, the conclusions of the Murrell Study are suspect.

In an attachment to the MMTC comments, Dr. A.J. Murrell's study¹⁴ attempted to determine whether the record keeping of broadcasters on their minority recruitment efforts is adequate and how truthful broadcasters have been in their citation of sources for increasing minority employment at their stations. Briefly put, Dr. Murrell attempted to contact the cited sources to determine whether stations actually used these sources. She concludes that the record keeping is inadequate and "...to the extent that sources can be verified, there is limited evidence of an association with other efforts toward the enhancement of diversity."¹⁵

These strong conclusions were derived because Dr. Murrell and her assistants could only verify a small percentage of the listed sources. As Dr. Murrell cites, several recruitment sources were not contacted since they could not be verified. They include:¹⁶

¹³ NAB also notes MMTC's habit of failing to cite sources or references for virtually every contention regarding the EEO recruitment and/or compliance habits of broadcasters. Although citations are provided for the most of the obscure contentions within the volumes of material, MMTC makes many blanket statements of fact regarding broadcasters without any cited support for its conclusions.

¹⁴ A. J. Murrell, "Verification of Recruitment Sources Within the Radio Broadcast Industry: An empirical Study of FCC Compliance," Exhibit to Volume II, MMTC Comments, March 1999.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 7-8.

1. Newspapers, Magazines, Radio Stations, and Television Stations
2. Colleges, Universities, Trade Schools and High Schools
3. Employment Agencies, Temporary Agencies, and Welfare Agencies
4. Job or Career Fairs
5. Organizations without Local Addresses.
6. On-line Sources

Clearly, these sources are routinely used for attracting new employees, and even if they cannot be verified as to their use, conclusions derived without consideration would appear to be specious, at best.

As for the other sources that are listed that Dr. Murrell and her assistants attempted to contact and verify, the information presented is either misleading or woefully inadequate to lead to any general conclusions. First, while the report states that “[I]f the recruitment source could not be identified, it was eliminated from the sample and omitted from all subsequent analyses,”¹⁷ this is not the case. The 12% verification number cited numerous times¹⁸ is based upon the total number of sources listed by radio stations, not only the sources that are identified,¹⁹ as suggested by the above quote.

Second, there are no data reported indicating the cooperation of respondents, only that the data was not verified after only three attempts. In the era of telemarketing, many survey researchers are finding it difficult to contact and survey potential respondents for worthwhile research projects. Conclusions about the veracity of information are not implied when potential

¹⁷ *Id.* at 9.

¹⁸ *See id.* at 2, 10, 11, and 16.

¹⁹ *Id.* at 16.

respondents are unwilling to participate, as seems to be the case in this study. It is also a significant possibility that respondents were unable to participate due to personnel changes at recruitment sources.

MMTC relies on both the Tennessee and Murrell studies as evidence that strict enforcement and increased regulation of EEO rules is necessary.²⁰ However, the Commission should not place the same reliance on the conclusions in these studies.

B. NAB's EEO Outreach Rule Proposal Will Result In Better Outreach Than The Proposals Supported by MMTC, NOW and Others.

MMTC also lauded the FCC's proposal as magnificent,²¹ yet at the same time, if one examines the assertions in MMTC's comments, the FCC's EEO rules have been ineffective and should be thrown out. The logical response is precisely what NAB has proposed – a new outreach rule designed to consider all types of recruitment and provide stations with the ability to recruit in the way that best works for their station. It is illogical to propose reinstatement of a system that MMTC itself believes was ineffective.²²

MMTC proposes that the Commission require a “blanket notification process” where stations would e-mail or fax notices for every job vacancy to every local organization to ensure

²⁰ MMTC offers other proposals that would clearly place increased burdens on the Commission or are beyond the authority of the FCC to mandate. For example, MMTC requests “noncursory” review of all applications and a Zero Tolerance Policy that includes evaluation of all evidence which might be probative of discrimination. MMTC at 264–275. MMTC believes that behaviors such as giving “irrational excuses” for noncompliance and even selling airtime based on anti-minority or anti-woman appeals should be subject to its zero tolerance policy. *See e.g.* MMTC at 275–308.

²¹ *Id.* at 338.

²² *See id.* at 276 (“The Commission’s 1994 EEO Report found that even after 25 years, scores of broadcasters had not learned the elementary skill of recruiting widely ...”).

that all individuals will have notice of the information.²³ MMTC also states that one of its benchmarks for an effective EEO program includes having a specific number of minority and female sources that must be contacted.²⁴ This type of recruitment, while it may have been the status quo for the last three decades, is not the best method of getting the information out that will lead to quality applicants for job openings.

In fact, MMTC and other commenters agreed that there are other effective ways to provide outreach in addition to the traditional use of recruitment sources.²⁵ In fact, NOW notes that the Commission has recognized the importance of training and internship programs and encourages that mass media entities utilize these proactive methods of recruitment.²⁶ MMTC now also admits that effective recruitment can result from job fairs,²⁷ job lines and job banks,²⁸ and Internet postings.²⁹

However, commenters argue that these types of efforts should supplement, but not be a substitute for, the traditional recruitment that the FCC proposed. MMTC and NOW both believe that use of the Internet is not a valid form of recruitment because it is not yet “universal”³⁰ due to

²³ *Id.* at 222 – 223.

²⁴ *Id.* at 224.

²⁵ *See* MMTC at 232; AWRT at 3 –5 (AWRT’s proposes 12 steps that include virtually all of the suggested initiatives as NAB); NOW at 38 – 39.

²⁶ NOW at 39.

²⁷ MMTC at 230.

²⁸ *Id.* at 232.

²⁹ *Id.* at 232.

³⁰ NOW at 39.

the claimed “digital divide.”³¹ The premise that the Internet is not universal or minorities cannot afford a computer with Internet access is unfounded. In comments filed by the 46 Named State Broadcast Associations (“State Associations”), they state that the number of individuals who use the Internet is growing at 67,000 per day.³² Additionally, the State Associations note that nearly 75% of the public libraries offer public access to the Internet.³³ Indeed, the Commission’s “e-rate” program was put into place to ensure universal access to the Internet and other advanced communications technology at schools and libraries.³⁴ The Commission should not discount recruitment techniques that its own programs are making widely accessible. As further evidence of the growing use of the Internet, according to the State Associations’ comments, “the Web’s demographics are flattening to resemble those of the population at large as an increasing number of minorities use the Internet.”³⁵

Clearly, in today’s world, one does not need to buy a \$1,500 computer and \$500 in software to access the Internet, as stated by MMTC.³⁶ The Internet is quite possibly the best tool to use for outreach of any kind.

Effective use of the Internet is part of the proposal set forth by the Broadcast Executive Directors Association (“BEDA”).³⁷ The majority of state broadcasting associations have agreed

³¹ MMTC at 224. The “digital divide” refers to the racial and income gap in computer availability and use. *Id.* at 29. *See also* Chairman Kennard’s home page at <www.fcc.gov/commissioners/Kennard>.

³² Joint Comments of the 46 Named State Broadcasters Associations in MM Docket No. 98-204, filed March 1, 1999, at 21 [*hereinafter* “State Associations”].

³³ *Id.* at 21.

³⁴ *See* Chairman Kennard’s home page at <www.fcc.gov/commissioners/Kennard>.

³⁵ State Associations at 21.

³⁶ MMTC at 224.

to participate in BEDA's Broadcast Careers Program.³⁸ The program is more than merely posting job notices and resumes on the Internet. Participating stations and associations will be actively promoting the program over the air, in print media, at job fairs and through minority and female organizations to get the word out.³⁹ Any person will be able to know what jobs are open in the broadcasting industry – virtually nationwide – simply by logging on at home, at a public library, through their local minority or female organization's office or, hopefully, through the FCC. UCC, *et al.* believe that the FCC's proposal will "ensure that no person is excluded from the opportunity to learn of and apply for available positions."⁴⁰ However, the Internet is likely the best tool to reach that goal.

The Commission must not disregard other ways to recruit and "grow" qualified employees. Mentoring and internships can take local students and provide them with quality experience in the broadcasting industry that may lead to employment down the road. Stations that choose to provide training to current employees to provide new challenges will also benefit from maintaining those quality employees and will help to ensure diversity in internal promotions, an area not addressed under the proposed rule. These efforts must not go unnoticed by the FCC. NAB believes that all "non-traditional" types of recruitment – specifically use of the Internet – will be more effective and stations should be given the proper credit if these methods provide outreach.

³⁷ State Associations at 18.

³⁸ *Id.* at 19. Also note that the BEDA program is an integral part of NAB's proposal as well.

³⁹ State Associations at 21.

⁴⁰ UCC at 7.

IV. REPORTING

As noted in NAB's comments, we believe stations should not be required to file the Annual Employment Report (Form 395-B) merely for the Commission to monitor industry trends.⁴¹ We expressed concern that there is no guarantee that the Commission and others would not use the information contained in the forms to argue that specific stations are not meeting their EEO responsibilities – in effect reinstating the employment incentives the court found against in *Lutheran Church*. The reporting requirement imposes an inappropriate incentive to hire minorities and women in order to avoid penalties and further regulation if the numbers do not match the make up of the community – regardless of the fact that the Commission has stated it would not be comparing the statistics.

Our fear is justified based on comments filed by NOW and UCC. NOW states that the “submission of employment data will assist the Commission in discovering broadcast and cable operators who discriminate.”⁴² UCC believes that the information that identifies ethnic status, national origin or gender of employees, when compared to the general labor force, may establish a disparate impact discrimination claim under Title VII.⁴³ Clearly, the intended uses of the employment information go beyond the Commission's belief that the information will be used for statistical purposes only. Moreover, none of the comments explain why less burdensome methods of obtaining information such as random sampling would not achieve the FCC's goals.

⁴¹ NAB Comments at 28.

⁴² NOW at 48.

⁴³ UCC at 17 (*citing U.S. v. City of Warren*, 138 F.3d 1083 (1998)).

V. RECORDKEEPING

MMTC continues to insist that the former and proposed recordkeeping requirements are not burdensome to broadcasters no matter the size of the station.⁴⁴ MMTC estimates that it would take a broadcaster less than eight seconds per day to show compliance with the reporting requirements.⁴⁵ MMTC also believes other recordkeeping requirements such as applications and recruitment source information are “nonburdensome” because stations already must maintain most of these types of records.⁴⁶ Granted, many of the records kept by stations are required for other reasons in addition to any FCC rule – but none of the retention periods are as long as the license term of eight years. Additionally, MMTC fails to note the burden faced by all stations of procuring and maintaining detailed race and gender information on *every applicant for every job opening*.

This information has always been vital because the Commission used it to compare the applicant pools to the labor force in order to evaluate the station’s EEO compliance. Under the present proposal, the Commission looks to maintain this requirement, but the station has the burden of collecting and using the information in its self-assessment. The reality is that stations cannot force applicants to provide this information when they apply. It is strictly voluntary on the part of applicants. In the past, stations were basically required to hunt down this information, or face large fines for inadequate recordkeeping and self-assessment.

Clearly, this is the additional – and likely impermissible –burden placed on stations that can be alleviated under NAB’s proposal. If this recordkeeping is only necessary for self-

⁴⁴ MMTC at 176.

⁴⁵ *Id.* at 178.

⁴⁶ MMTC at 179.

assessment purposes, it can be eliminated because compliance with the NAB's proposed rule achieves the goal of the Commission to provide the information to all applicants.

However, MMTC believes that the only way for stations to know that minorities and women have received adequate notice is to review the diversity of the applicant pools.⁴⁷ In fact, MMTC would take this self-assessment one step further, by requiring stations to evaluate their interview pool diversity.

As stated in NAB's comments, requiring stations to evaluate applicant pools to self-assess is questionable under the *Lutheran Church* decision.⁴⁸ Clearly, requiring comparisons of interview pools to labor force data is one step closer to the impermissible incentive described by the court in *Lutheran Church*. MMTC's micro-managed regulatory scheme would have the FCC "require broadcasters to ensure that minorities and women, whose written materials disclose no obvious non-qualification, are included in interview pools and are thus given a chance to prove they're the best applicants."⁴⁹ This type of regulation would require broadcasters *to know before the interview process even begins* which applicants were minorities and women. Imposing such a requirement would put the Commission in the fast lane back to court.

VI. ENFORCEMENT

While enforcement of any FCC rule is important, MMTC proposes to turn the FCC into a mini-EEOC in order to properly police stations with regard to EEO compliance. The MMTC plan would repeal the "NBC policy," or at a minimum have the FCC be more flexible in considering individual *allegations* of discrimination instead of waiting for a final determination

⁴⁷ *Id.* at 227.

⁴⁸ NAB Comments at 27.

⁴⁹ MMTC at 228.

from the appropriate authority on EEO – the EEOC.⁵⁰ MMTC wants the FCC to investigate all evidence, hold hearings and make final determinations.⁵¹

While the FCC may have some limited authority to look into discrimination allegations under its Memorandum of Understanding with the EEOC, it does not mean that it is experienced or capable to undertake those duties. Any EEO rule can be properly enforced through random audits. In the case of NAB's proposal, the FCC would be receiving certifications of compliance every two years from stations with five or more full-time employees. Stations will be reporting to the Commission exactly what they have done for EEO Outreach at four separate times in a license term. NAB believes this requirement plus the potential for an audit ensures that stations will conduct the outreach as outlined by NAB and properly certify to those efforts.

VII. SUNSET

As MMTC argues, the FCC's regulation of EEO Outreach must be terminated at some point in time. The Commission must establish a goal and sunset the rules. MMTC believes that sunset should occur when "the representation of minorities and women in broadcasting reaches parity with minorities' and women's representation in the population at all levels, including sales and senior management."⁵² That is when, MMTC believes, the "common discriminatory practices such as word-of-mouth recruitment from a homogenous workforce will cease to be a

⁵⁰ *Id.* at 328 – 331.

⁵¹ *Id.*

⁵² MMTC at 41.

useful tool for maintaining discrimination.”⁵³ MMTC even ties this goal to a specific date – 2009 – the 100th anniversary of broadcasting.⁵⁴

There are two obvious problems with establishing parity as the goal for the sunset of EEO regulation. First, as MMTC already provides, there are already several positions that are above parity and others that are nearly at parity. Isn’t the goal that MMTC has suggested already met for those positions? Therefore, is MMTC suggesting that EEO rules should only be in place for those positions that currently are under parity for minorities and women? Furthermore, what about a station that already has reached parity in its own communities? Is MMTC suggesting that those stations be exempted from any EEO requirements because they have met the goals suggested by MMTC?

Second, establishing parity as the goal assumes that the broadcasting industry is still “discriminating” by use of word-of-mouth recruitment from a homogenous workforce when it is at one percent below parity. Once the magic “parity” goal is reached, only then would the EEO rules sunset. It is ridiculous that the sunset of the EEO rules should depend on the industry meeting a specific quota. The Commission’s goal in establishing EEO outreach rules is to ensure that the information is provided to all qualified applicants. This can be measured by evaluating the efforts of stations to provide the information – if they use the Internet, faxes, e-mails, etc. – without evaluating whether or not a specific number of minorities and females have been informed of the openings, considered for positions or even hired in the positions. Again, establishing any sort of incentive to hire minorities and females may be impermissible. Tying

⁵³ *Id.*

⁵⁴ *Id.* at 42.

sunset of EEO regulations to reaching an established quota puts the FCC into the position of creating discriminatory hiring incentives – the vice found in *Lutheran Church*.

VIII. CONCLUSION

NAB has provided the FCC with a meaningful, sincere proposal for EEO Outreach. We believe that our proposal meets the goal of the Commission and balances with the needs of broadcasters. The Commission must take the opportunity to establish outreach rules that will be efficient and effective. The best way to accomplish this is to promulgate a rule as proposed by NAB.

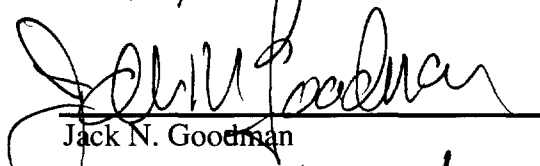
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OF BROADCASTERS**

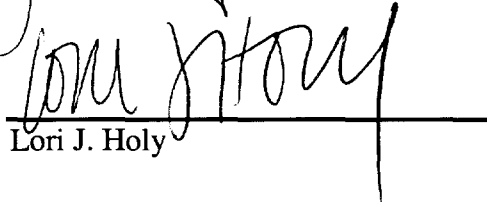
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CERTIFICATE OF SERVICE

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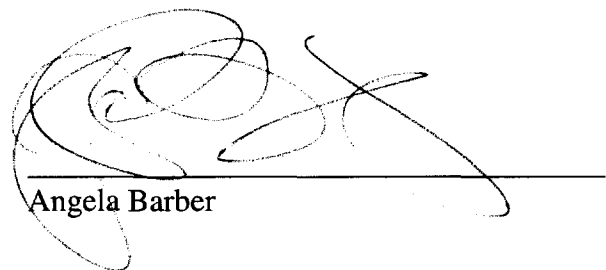
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APPENDIX A

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**FEDERAL COMMUNICATIONS COMMISSION
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Streamlining Broadcast EEO
Rule and Policies, Vacating the EEO
Forfeiture Statement
and Amending Section 1.80 of
the Commission's Rules to Include
EEO Forfeiture Guidelines

MM Docket No. 96-16

**Reply Comments of The
National Association of Broadcasters**

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Summary

The vast majority of comments support changing the Commission's present EEO policies. Only a few parties argued that the Commission should retain its present stance or, in one instance, that it should require more EEO showings from broadcasters.

The policies that MMTC urges the Commission to adopt in its rambling and belated submissions would place the FCC's entire EEO policies at risk. The assumption in the *Notice* that the Supreme Court's *Adarand* decision applies only to affirmative action plans and not programs like the Commission's is unwarranted. *Adarand* subjects every government-mandated racial classification to strict scrutiny, and there can be no doubt that the race-conscious recruiting and recordkeeping requirements that the Commission proposes to retain would be subject to such scrutiny. Further, recent cases suggest that the diversity rationale that has supported FCC EEO enforcement is suspect. Because the EEO rules are not based on a showing of past discrimination and are not limited in duration, they run the risk of failing judicial scrutiny. To minimize the risk of constitutional attack, NAB urges the Commission to adopt more flexible recruitment and recordkeeping requirements.

In support of its views, MMTC submitted a "study" of EEO performance by Tennessee radio stations. The errors in data collection and analysis in this submission are rampant and provide no basis on which the Commission could rest a decision.

Other regulatory changes proposed by AWRT, NOW, or MMTC would also run afoul of judicial scrutiny or are not supported by evidence that they are needed to achieve the Commission's EEO objectives.

Finally, the record before the Commission is more than adequate to support a conclusion that its current rules create an undue burden for small station and stations in small